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Before The
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

JUL 26 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

Southwestern Bell Telephone Company's)
 Comparably Efficient Interconnection to)
 Plan For Internet Access Service)

CC Dockets No. 85-229, 90-623,
 and 95-20

COMMENTS OF THE COMMERCIAL INTERNET EXCHANGE ASSOCIATION

The Commercial Internet eXchange Association ("CIX"), by its attorneys, respectfully submits these comments to the "Southwestern Bell Telephone Company's Comparably Efficient Interconnection Plan for the Provision of Internet Support Services," (the "SWBT Support Plan") filed on June 21, 1996.¹ CIX is concerned that the SWBT Support Plan does not comply with the self-effectuating CPNI provisions of the 1996 Telecommunications Act, 47 U.S.C. § 222. In addition, the plan here, when read in conjunction with the SWBT Internet Access Plan, does not coherently describe what services are available to independent Internet service providers ("IISPs").

CIX is a non-profit organization that operates to facilitate global connectivity among commercial IISPs throughout the world.² CIX works to foster fair and open environments for Internet commercialization and interconnection, and provides a forum for the exchange of experiences and ideas to enhance the vitality of the IISP industry. Its members are committed to

¹ These comments are filed pursuant the FCC Public Notice released June 26, 1996, DA 96-1031. We note that, on August 3, 1995, Southwestern Bell filed with the Commission a CEI plan for its Internet access service (the "SWBT Internet Access Plan"); approval of that plan is still pending before the Commission.

² These comments represent the views of CIX as a trade organization and may not reflect the views of the individual members. A CIX membership list is attached hereto.

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a high standard of consumer choice and universal connectivity between IISPs. Several CIX members currently operate in the Southwestern Bell service area and will be directly impacted by the SWBT Plan.

The SWBT Support Plan introduces "Internet Support Services," described as "customer sales, referrals, and billing for Internet service providers," or, more to the point, "its affiliate, Southwestern Bell Internet Services, Inc." SWBT Support Plan at 2, and, attached chart, "SWBT Internet Support Services." This means that SWBT employees will use Customer Proprietary Network Information ("CPNI") to market its affiliated Internet access service provider. The SWBT Support Plan does not include the provision or even the availability of these Support Services to any other entity, although an attachment to the CEI plan somewhat nonsensically implies that other entities may use these Support Services. SWBT's obvious emphasis on the use of CPNI raises questions as to whether it filed this plan in an effort to circumvent federal CPNI restrictions.

I. CPNI Issues Are Not Adequately Addressed by the SWBT Support Plan

SWBT seeks FCC authority to turn its vast assets and many employees operating the basic, regulated telephone service to the task of marketing, billing and otherwise promoting SWBT's unregulated Internet access venture. The use of CPNI is, therefore, at the core of SWBT's service plan. Somewhat defiantly, however, SWBT asserts that "as long as it remains in full compliance with existing FCC rules governing use of CPNI for enhanced services or CPE purposes, SWBT should be deemed compliant with the CPNI provisions of the Telecommunications Act of 1996." SWBT Support Plan at 13. Given that Congress has carefully crafted an additional set of statutory CPNI restrictions, distinct from the CEI CPNI restrictions, that applies to all common carriers, SWBT's position is inconsistent with current law, making it impossible for the Commission to approve the plan.

While the Commission's decisions in the 1980's established CPNI restrictions as nonstructural safeguards when Bell operating companies offer enhanced services,³ the Telecommunications Act of 1996 ("1996 Act") establishes separate restrictions on the use of CPNI that apply to every telecommunications carrier. 47 U.S.C. § 222(a). Section 222 is self-effectuating since enactment of the 1996 Act on February 8, 1996.⁴ Because SWBT intends to offer Internet access and support services in conjunction with its regulated telecommunications services, the CPNI obtained from its provision of telecommunications services is subject to Section 222 when it is used to further the proposed Internet services. *Id.* at § 222(c)(1) (telecommunications carrier may use CPNI only to provide the telecommunications service requested). Thus, Section 222 prohibits SWBT from using the CPNI obtained through its offering of regulated telecommunications services in order to market or otherwise promote its Internet service, "except as required by law or with the approval of the customer." *Id.* SWBT's claim that it need only comply with the CEI CPNI restrictions is, in effect, a statement that it does not intend to comply with Section 222 until the Commission completes its CPNI Proceeding. However, the Commission itself has explained that the CEI CPNI requirements are distinct from the Section 222 CPNI requirements and that "[t]o the extent that the 1996 Act requires more of a carrier, or imposes greater restrictions on a carrier's use of CPNI, the statute, of course, governs." CPNI Proceeding at ¶ 2. SWBT's attempt to "sneak" its noncompliance

³ See, e.g., "In the Matter of Telecommunications Carriers' Use of Customer Propriety Network Information and Other Customer Information," Notice of Proposed Rulemaking, CC Dkt. No. 96-115, FCC 96-221 at ¶ 5 (rel. May 17, 1996) ("CPNI Proceeding").

⁴ The CPNI Proceeding does not stay any portion of Section 222. Indeed, the issues raised herein are not the subject of further clarification. In any case, RBOCs may not avoid compliance with the plain meaning of the statute by filing requests that the Commission, on its own, further clarify certain aspects of the statute.

through in a CEI plan is disingenuous at best and likely violates FCC regulations as well as the Telecommunications Act.

CIX raises this issue because of these legal infirmities and because the use of CPNI in a manner inconsistent with Section 222 poses significant risks of unfair advantage for SWBT in the Internet access market. In addition to legitimate end-user privacy concerns, proper use of CPNI by the incumbent LEC is particularly critical in markets like Internet access where a multitude of service providers compete head-to-head with the incumbent LEC. *Cf.*, CPNI Proceeding, at ¶ 15 ("we believe that Congress sought to address both privacy and competitive concerns by enacting Section 222."). Abuse of the customer information of a competitor obtained by virtue of the incumbent LEC's monopoly position in the provision of basic transport services is a serious threat to the viability of a competitive Internet access market. Such an outcome is clearly contrary to the Commission's Computer III policy objectives and contrary to the purposes of the Telecommunications Act of 1996. *See*, Joint Explanatory Statement at 205 ("the new section 222 strives to balance both competitive and consumer privacy interests with respect to CPNI.").

For example, under SWBT's intended "Support Services" plan, a SWBT sales representative could well use CPNI information without prior customer approval that indicates Internet usage (such as subscription to ISDN, other data services, multi-line residential subscribers, usage patterns, etc.) to obtain an accurate list of the customers of competing Internet access providers in its local exchange area, and then initiate a barrage of marketing to lure IISP customers to SWBT's service. This example is more than just hypothetical. SWBT states that it "plans to obtain customer approval for use of its CPNI to provide Internet Support Services during each conversation between a SWBT sales representative and a prospective customer of the service." SWBT Support Plan at 14. Apparently, SWBT plans to use the CPNI first and compile the marketing list, and then obtain customer approval during the time that it is marketing its Internet service. As explained above, that practice is clearly inconsistent with Section 222

requirements. While SWBT asserts that it will obtain customer approval "pursuant to the customer approval provisions of Section 272(c) of the 1996 Act," (SWBT Support Plan at 14), Section 272(c) does not provide an exception for such activity. *See* 47 U.S.C. § 272(c) (nondiscrimination safeguards apply to relationship between RBOC and separate affiliate).

Although the practices described by SWBT may well have been permissible under the CEI CPNI restrictions under certain circumstances,⁵ those practices violate Section 222(c)(1) of the Communications Act, which prohibits SWBT from using the information obtained in the provision of telecommunications service, such as ISDN, without the customer's prior approval.⁶ 47 U.S.C. § 222(c); CPNI Proceeding at ¶¶ 20, 21, 23 (Commission repeatedly explains that Section 222 prohibition requires "prior customer authorization"); *id.* at ¶ 26 ("CPNI obtained from the provision of any telecommunications service may not be used to market information services or CPE without prior customer authorization.").

Moreover, consistent with its overall reluctance to comply with Section 222 of the 1996 Act, SWBT does not address in any manner its obligation under Section 222(c)(2) to disclose CPNI to a competing IISP or its obligation under Section 222(c)(3), as a condition of using aggregate CPNI, to offer such CPNI to competing IISPs "on reasonable and nondiscriminatory terms and conditions upon reasonable request therefor." 47 U.S.C. § 222(c)(2)&(3). These

⁵ Under the CEI CPNI restrictions, Bell operating companies may "use the CPNI of customers that subscribe to 20 or fewer lines . . . without prior authorization." CPNI Proceeding at ¶ 5. The Commission's rules do not, however, permit competing enhanced service providers that same access to CPNI.

⁶ Customer approval after the fact, such as when the sales representative calls the customer after the CPNI has already been used, undermines the competitive interests that Congress sought to protect since the LEC has already used the information to form a marketing strategy and to actually contact competitors' customers.

statutory provisions were intended to protect independent providers competing against RBOC services, and they should have certainly been addressed in the SWBT Support Plan.

Finally, we note that it is not adequate for SWBT to file, or for the Commission to evaluate, the SWBT Support Plan without reconciling it with the Section 222 standards. Bechtel v. FCC, 957 F.2d 873, 881 (D.C. Cir. 1992), *cert denied*, Galaxy Communications Inc. v. FCC, 113 S. Ct. 57 ("changes in factual and legal circumstances may impose upon an agency an obligation to reconsider a settled policy or explain its failure to do so."). Section 222 is self-effectuating, it is statutory law and it was so at the time that SWBT filed its plan. The CPNI Proceeding cannot and does not stay the effectiveness of the statutory CPNI requirements; indeed, the issues raised here are not the subject of further rulemaking or clarification in that proceeding.⁷ Therefore, the burden properly rests with the party proposing the plan to demonstrate that the public interest, as expressed in Section 222 of the Communications Act, would be best served by Commission approval of the plan.

II. SWBT Should Clarify Services offered to IISPs

The SWBT Support Plan is ambiguous, at best, concerning the support services it proposes to offer to competing IISPs. In the "Service Description" it claims that "SWBT's planned Internet Support Services offering will include customer sales, referrals, and billing for Internet service providers (ISPs)." SWBT Support Plan at 2. In the next sentence, however, SWBT states "[s]pecifically, SWBT plans to provide these services to its affiliate, Southwestern Bell Internet Services, Inc." Id. Which is it? Again, in the diagram attached to the SWBT Support Plan, entitled "SWBT Internet Support Services," the recipients of the service order

⁷ Cf., "Bell Atlantic Telephone Companies Offer of Comparably Efficient Interconnection to Providers of Internet Access Services," Order, CCBPol 96-09, DA 96-891 at ¶ 47 (rel. June 6, 1996), *recon. pending* (MFS' arguments that Bell Atlantic's CEI plan fails to comply with Section 251 and 252 interconnection requirements are beyond the scope of the CEI proceeding and are the subject of an on-going rulemaking proceeding).

referral, bill inquiry, bill rendering, and collections services are named as "SBIS or Other Internet Service Provider." While CIX finds it hard to believe that competitive IISPs would receive customer referrals or other support from SWBT, the plan implies just that.

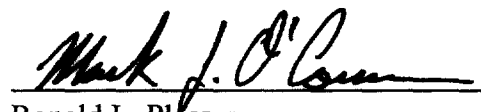
We also note that in its SWBT Internet Access Plan, SWBT stated that it would provide "third-party billing for participating IAPs [Internet Access Providers] who desire such services under our existing billing and collection arrangements." SWBT Internet Access Plan at 4. Given the ambiguity of the SWBT Support Plan, CIX questions the accuracy of this statement in the SWBT Internet Access Plan. Clarification of these blatant ambiguities is not only consistent with the Commission's rules, 47 C.F.R. § 1.41, and helps independent competing providers understand what services are, and are not, available to it from the incumbent LEC.

Conclusion

CIX requests that the Commission not approve the SWBT Support Plan until SWBT demonstrates that its planned use of CPNI is fully compliant with Section 222 of the Communications Act.

Respectfully submitted,

COMMERCIAL INTERNET EXCHANGE
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WHO MAY JOIN THE CIX?

Membership in the Commercial Internet eXchange is open to organizations which offer TCP/IP or OSI public data internetworking services to the general public in multiple geographic regions. Organizations or individuals seeking Internet connections are urged to contact CIX members directly for further information. Qualified public data Internet service providers interested in exchanging commercial traffic with other providers on a peer basis are most welcome and encouraged to become CIX Association members.

WHAT NETWORKS ARE MEMBERS OF CIX?

Last Updated: July 18, 1996

- o 2020Net - Eastern U.S.
- o 3C Europe Ltd. - United Kingdom
- o 3 Web Corp - Japan
- o ACSI - Southern U.S.
- o Advantis(IBM Global Network) - National U.S.
- o Agate Internet Services - Bangor, Maine
- o American Network - New York
- o ANS CO+RE Systems, Inc. - National U.S.
- o Apex Global Info Systems(AGIS) - National U.S.
- o ASAHl Net - Japan
- o Ascend Communications, Inc. - National U.S.
- o Ashton Communications - Mexico & Southwest U.S.
- o Asociados Espada C.A. - Venezuela
- o ATMNet, LLC - California and Florida
- o Aurora.Net - Canada
- o a2i Communications - San Francisco Bay Area
- o alpha-web - Japan
- o BBN Planet - National U.S. and International
- o BEKKOAME INTERNET INC. - Japan
- o Best Internet Communications - California
- o BTnet - United Kingdom
- o Bull HN Information Systems Inc. - Massachusetts
- o Cable Internet - United Kingdom
- o Cable Online Ltd. - United Kingdom
- o Cable&Wireless NetWorth - National U.S.
- o Capcon Library Network - Virginia, Maryland
- o CentNet - Boston Area
- o CERFnet - West Coast U.S.
- o Commonwealth Telephone Company - Pennsylvania
- o Compuserve - National U.S. & International
- o connect.com.au - Australia
- o CR Internet - Japan
- o CRL - National U.S.
- o Crocker Communications - Massachusetts
- o Crossroads Communications - National U.S.
- o CTS Network Services - California
- o Cybergate - Florida, Southeast U.S.
- o Dart Net, Ltd. - United Kingdom
- o Datalytics - Midwest U.S.
- o DataNet - Hungary
- o Data Research Associates - National U.S., Canada, Far East, Europe and South America
- o DataXchange - Florida
- o Dayton Network Access Company - Ohio
- o Demon Internet - United Kingdom
- o Destek Group, Inc. - Northern New England
- o Digital Express Group - East Coast, U.S.
- o DirectNet Corp. - National U.S.
- o EasyNet Group, Plc - United Kingdom
- o EMI Communications - National U.S.
- o Emirates Internet - United Arab Emirates
- o EskimoNet - Western Washington State
- o EUnet - Europe
- o EuroNet Internet - Europe
- o Exodus Communications - California
- o EZnet - New York
- o FIBRCOM - Southern U.S. and Mexico
- o Fibernet - National U.S.
- o Fujitsu - Japan
- o GetNet International - National U.S.
- o Globalcenter.net - National U.S. and Canada
- o GoodNet - National U.S.
- o GST Internet - Northwest U.S.
- o GridNet International - Southeastern U.S.
- o Hewlett Packard Labs - United Kingdom
- o HiNet - Taiwan
- o Hitachi, Ltd. - Japan
- o HLC-Internet - National U.S.
- o Hong Kong Supernet - Hong Kong
- o HookupNet - Canada
- o I-2000 - Northeastern U.S.
- o ICon International - National U.S.
- o Iij - Japan
- o InfoTek - South Africa
- o INS(Inter Networking Systems) GmbH - Germany
- o INS Info Services - Iowa/Midwest
- o INSINC - Canada
- o InterCon - Virginia
- o Internet Atlanta, Inc. - Southeast U.S.
- o Internet Corporativo - Mexico
- o Internet Exchange Europe - Netherlands
- o InternetKDD - Japan
- o The Internet Mainstreet - San Francisco Bay Area, CA
- o Internet Media Network, Inc. - Southern CA.
- o Internet Oklahoma - Oklahoma
- o Internet Public Access Corp. - San Jose, California
- o Interpath - Southeast U.S.
- o InterServe Communication - Hong Kong
- o ITnet - Italy
- o IUnet - Italy

- o JC Information Systems - California
- o JTNET - Japan
- o KorNet - Korea
- o LDS-iAmerica - National U.S.
- o Lincoln Telephone & Telegraph - Nebraska
- o Logical Net - New York
- o LYNX - Bermuda
- o MCI - National U.S. & International
- o MISNET - Kentucky
- o Mitsubishi Electric Network Information Co.(MIND) - Japan
- o NEC - Japan
- o Net 99 - National U.S. and International
- o NETCOM - National U.S.
- o NetDirect Internet - United Kingdom
- o NetNet, Inc. - Wisconsin
- o NetVision - Israel
- o Netway Communications Inc. - California
- o New York Net - New York
- o Nissan Information Network Co. Ltd. - Japan
- o NorthWestNet - Northwest U.S.
- o Novia Internetworking - Nebraska
- o OCTACON - United Kingdom
- o Open Business Systems - Illinois
- o O.S.I. Guatemala - Guatemala, Honduras, and El Salvador
- o Pacific Bell Internet - California
- o PearlVision (PEARL-NET) - Japan
- o Pilot Network Services - San Francisco Bay Area
- o Planet Online Limited - United Kingdom
- o PSINet - National U.S. and Japan
- o Qwest Communications - Western U.S.
- o RACSAnet - Costa Rica
- o RGNet - Oregon/California
- o RIMNET - Japan
- o SARENET - Spain
- o Singapore Telecom - Singapore
- o Sovam Teleport - Russia
- o SpinNet (AT&T Jans) - Japan
- o SprintLink - National U.S.
- o Sun Microsystems Inc. - National U.S.
- o Synergy Communications - National U.S.
- o Tachyon Communications Corp. - Florida
- o TCHUdata - Kenya, Africa
- o Telecom Finland Ltd. - Northern Europe
- o TheOnRamp Group, Inc. - National U.S.
- o ThoughtPort - National U.S.
- o TogetherNet - Vermont and New York City
- o Tokai Communication Platform Network(TCP-Net) - Japan
- o TokyoNet - Japan
- o Total Connectivity Providers - United Kingdom
- o TWICS - Japan
- o U-NET - United Kingdom
- o Unipalm PIPEX - United Kingdom
- o US Cyber - National U.S.
- o USIT - Tennessee
- o UUNET Technologies, Inc. - National U.S.
- o VBCnet (GB) Ltd. - National U.S., United Kingdom, Ireland and Portugal
- o Vision Network Limited - Hong Kong

Additional networks are joining each month.

CERTIFICATE OF SERVICE

I, Catherine C. Ennels, a secretary for the law firm of Piper & Marbury L.L.P., hereby certify that on this 26th day of July, 1996, a copy of the foregoing "Comments of the Commercial Internet eXchange Association" was served via hand delivery upon the following :

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In addition, a copy of the "Comments of the Commercial Internet eXchange Association" was sent this day via first-class U.S. mail, postage pre-paid, to Robert M Lynch, Durward D. Dupre, Michael J. Zpevak, Robert J. Gryzmala, Attorneys for Southwestern Bell Telephone Company, One Bell Center, Suite 3520, St. Louis, MO 63101.

A handwritten signature in dark ink, appearing to read 'Catherine C. Ennels', is written over a horizontal line.

Catherine C. Ennels